Supreme Court, U. S.
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APPENDIX

In The

Supreme Court of the United States

October Term, 1974

Nos. 74-1302 and 74-1316
Consolidated

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,

Defendants-Appellants,

vs.

TURNER ELKHORN MINING COMPANY, et al.,

Plaintiffs-Appellees.

TURNER ELKHORN MINING COMPANY, et al.,

Plaintiffs-Appellants,

vs.

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Kentucky

NO. 74-1302 FILED APRIL 16, 1975
JURISDICTION NOTED JUNE 9, 1975

NO. 74-1316 FILED APRIL 18, 1975
JURISDICTION NOTED JUNE 9, 1975

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Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

TURNER ELKHORN MINING COMPANY, a Kentucky corporation; SOUTH-EAST COAL COMPANY, a Kentucky corporation; RUSSELL FORK COAL COMPANY, a West Virginia corporation; PEABODY COAL COMPANY, a Delaware corporation; ZEIGLER COAL COMPANY, an Illinois corporation; ALABAMA BY-PRODUCTS CORPORATION, a Delaware corporation; AMHERST COAL COMPANY, a West Virginia corporation; ARCH MINERAL CORPORATION, a Delaware corporation; CF&I STEEL CORPORATION, a Colorado corporation; CANNELTON INDUSTRIES, INC., a West Virginia corporation; CARBON FUEL COMPANY, a West Virginia corporation; CENTRAL OHIO COAL COMPANY, an Ohio corporation; FREEMAN COAL MINING COMPANY, Division of Material Service Corporation, a Delaware corporation; HAWLEY COAL MINING CORPORATION, a West Virginia corporation; IMPERIAL COLLIERY COMPANY, a West Virginia corporation; KESSLER COALS, INC., a West Virginia corporation; MEARS COAL COMPANY, a Pennsylvania corporation; MILBURN COLLIERY COMPANY, a West Virginia corporation; OLD BEN COAL CORPORATION, a Delaware corporation; OMAR MINING COMPANY, a West Virginia corporation; SLAB FORK COAL COMPANY, a West Virginia corporation; THE NORTH AMERICAN COAL CORPORATION, an Ohio corporation,

Plaintiffs,

vs.

PETER J. BRENNAN, Secretary of the United States Department of Labor, an Agency of the Federal Government, and CASPAR W. WEINBERGER, Secretary of the United States Department of Health, Education and Welfare, an Agency of the Federal Government,

Defendants.

Before a Three-Judge District Court, The Hons. Pierce Lively, Circuit Judge, H. David Hermansdorfer and Bernard T. Moynahan, Jr., District Judges, Presiding

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Docket Entries

VOLUME ONE

1.	COMPLAINT filed.	8-8-73
2.	SUMMONS, with Marshal's Return, filed. (Executed 8/8/73)	9-10-73

3. DESIGNATION of Three Judge Panel filed. 9-20-73

4. FIRST REQUEST of plffs for production of documents filed. 9-27-73

5. FIRST SET OF INTERROGATORIES of plffs directed to deft BRENNAN filed. 10-1-73

6. MOTION of plffs to convene Three-Judge Court filed. 10-3-73

7. MEMORANDUM of plffs in support of motion to convene Three-Judge Court filed. 10-3-73

8. NOTICE of hearing on plffs' motion to convene Three-Judge Court at court's convenience filed. 10-3-73

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10. ANSWER of defts filed. 10-9-73

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16. ANSWER of deft WEINBERGER to plffs' first request for production of documents filed. 11-12-73

17. ANSWER of deft BRENNAN to plffs' first request for production of documents filed. 11-12-73

18. ANSWERS of deft BRENNAN to plffs' first set of Interrogatories filed. 11-12-73

19. OBJECTIONS of deft BRENNAN to plffs' first request for production of documents filed. 11-12-73

20. MEMORANDUM of deft BRENNAN in support of objections to plffs' first request for production of documents filed. 11-12-73

21. OBJECTIONS of deft BRENNAN to plffs' first set of Interrogatories filed. 11-12-73

22. MEMORANDUM of deft BRENNAN in support of objections to plffs' first set of Interrogatories filed. 11-12-73

23. FIRST REQUEST of plffs for Admission of Fact filed. 11-21-73

24. SECOND SET OF INTERROGATORIES of plffs filed. 11-21-73

25. MOTION of deft WEINBERGER to dismiss action as to Sec., H.E.W., or in the alternative to drop Sec. H.E.W. as a misjoined party filed. 11-23-73

26. MEMORANDUM of deft WEINBERGER in support of motion to dismiss action as to Sec., H.E.W., etc. filed. 11-23-73

27. MEMORANDUM of plffs in opposition to deft WEINBERGER'S motion to be dismissed as party defendant filed. 12-3-73

28. MOTION of plffs to compel defts to produce documents and answer Interrogatories filed. 12-3-73

29. MEMORANDUM of plffs in support of motion to compel defts to produce documents and answer interrogatories filed. 12-3-73

30. NOTICE of plffs for hearing on motion to compel defts to produce documents, etc. at court's convenience. 12-3-73

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[Entries Nos. 31 through 52 note the filing of interrogatories directed to each of the plaintiffs by the Defendant Brennan which subsequently were withdrawn]

VOLUME TWO

53. ORDER: Motion of deft WEINBERGER assigned for hearing at Catlettsburg on 1/21/74 at 4:00 P.M. 12-12-73

54. REPLY MEMORANDUM of deft WEINBERGER in support of motion to dismiss Sec., H.E.W. as party deft filed. 1-8-74

55. NOTICE of plffs that on 1/21/74 plffs will request court to entertain argument and render decision on plffs' motion to compel defts to produce documents & answer interrogatories. 1-16-74

56. ANSWERS of defts to plffs Second Set of Interrogatories TENDERED. 1-21-74

57. OBJECTIONS of defts to plffs' Second Set of Interrogatories TENDERED. 1-21-74

58. MEMORANDUM of defts in support of objections to plffs' second set of Interrogatories TENDERED. 1-21-74

59. STATEMENT of defts in response to plffs' first request for admissions of fact TENDERED 1-21-74

60. ORDER: HEARING AT CATLETTSBURG on 1/21/74: court took motion of deft WEINBERGER to be dismissed as party defendant under advisement. 1-22-74

61. MOTION of defts for stay of proceedings filed. 2-7-74

62. NOTICE of defts of hearing on motion for stay at court's convenience filed. 2-7-74

63. STATEMENT of Points & Authorities of defts in support of motion for stay of proceedings filed, with Exhibits A & B. 2-7-74

64. MOTION of plffs for summary judgment filed. 2-15-74

64a. AFFIDAVIT of J. Huell Briscoe filed. 2-15-74

64b. Document Re William Thompson, et al. 2-15-74

64c. Document Re William Thompson. 2-15-74

64d. Document Re Claude Pennington. 2-15-74

64e. Document Re Cecil Purnell. 2-15-74

64f. Document Re Andrew Smith. 2-15-74

64g. Document Re Alva A. Libby. 2-15-74

64h. Document Re Craig Fulton. 2-15-74

65. MEMORANDUM of plffs in support of motion for summary judgment filed. 2-19-74

65a. APPENDIX to plffs' memorandum in support of motion for summary judgment filed. 2-19-74

66. MEMORANDUM of plffs in opposition to defts' motion for a stay of proceedings filed. 2-20-74

67. ORDER: Assigned for hearing on all pending motions on 3/4/74. 2-21-74

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69. MOTION of plffs for leave to file supplemental affidavit in support of motion for summary judgment filed. 2-27-74

70. AFFIDAVIT of George W. Wright TENDERED. 2-27-74

71. MOTION of defts to file Exhibit A in support of motion for extension of time filed. 2-28-74

72. Exhibit A—Copy Opinion in National Independent Coal Operator's Association, et al vs: Brennan and Association of Bituminous Contractors, Inc., et al v. Brennan TENDERED. 2-28-74

73. ORDER: HEARING ON ALL PENDING MOTIONS ON MARCH 4, 1974; defts' motion for a stay of proceedings sustained; stay effective until 4/22/74 except that defts shall file their response to plffs' motion for summary judgment no later than 20 days from date of this order. 3-5-74

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75. ORDER: defts given to & including 4/10/74 to file response to plffs' motion for summary judgment. 3-18-74

VOLUME THREE

76. MOTION of defts to strike affidavits and other documents in support of plffs' motion for summary judgment filed. 4-10-74

77. STATEMENT OF POINTS & AUTHORITIES of defts in support of motion to strike filed. 4-10-74

78. MOTION of defts to dismiss and cross-motion for summary judgment filed. 4-10-74

78a. Copy of decision of three-judge court in National Independent Coal Operator's Association, et al v. Brennan, Civil Action No. 1711-13 (D.C. 2/21/74). 4-10-74

79. MEMORANDUM of defts in support of motion to dismiss and cross-motion for summary judgment filed. 4-10-74

79a. Exhibits of deft. 4-10-74

80. NOTICE of defts for hearing on motion to dismiss & cross-motion for summary judgment, motion to strike affidavits & other documents in support of plffs' motion for summary judgment at court's convenience. 4-10-74

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82. TRANSCRIPT of hearing at Catlettsburg on 1/21/74 filed by Official Reporter. 4-25-74

• • •

84. ORDER: all proceedings stayed pending appeal in National Independent Coal Operators Association, et al v. Brennan. 5-2-74

85. MEMORANDUM of plffs in response to defts' motion to dismiss, cross-motion for summary judgment and motion to strike TENDERED. 5-10-74

86. MOTION of plffs to vacate stay and application for preliminary injunction filed. 5-31-74

87. MEMORANDUM of plffs in support of plffs' motion to vacate stay and application for preliminary injunction filed. 5-31-74

88. NOTICE of plffs for hearing on foregoing motions at court's convenience filed. 5-31-74

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91. TRANSCRIPT of Hearing at Pikeville on 3/4/74 filed by Official Reporter. 6-10-74

92. STATEMENT of defts in opposition to plffs' motion to vacate stay filed. 6-20-74

93. MEMORANDUM of defts in opposition to plffs' motion to vacate stay filed. 6-20-74

94. STATEMENT of defts in opposition to plffs' application for preliminary injunction filed. 6-20-74

95. MEMORANDUM of defts in opposition to plffs' application for preliminary injunction filed. 6-20-74

96. MOTION of plffs for hearing on their motion to vacate stay and application for preliminary injunction at earliest possible time filed. 6-21-74

97. REPLY MEMORANDUM of plffs in support of motion to vacate stay and applition for preliminary injunction filed. 7-3-74

98. ORDER: Assigned for hearing at Catlettsburg on 9/24/74 at 1 PM on plffs' motion to vacate stay. 9-6-74

99. MOTION of plffs for temporary restraining order filed. 9-18-74

99a. AFFIDAVIT of E. T. Brown, Jr. filed. 9-18-74

99b. NOTICE of hearing on foregoing motion at Catlettsburg on 9/24/74 filed. 9-18-74

100. MOTION of defts to strike plffs' application for temporary restraining order filed. 9-24-74

101. STATEMENT of defts in support of continuance of stay order and in opposition to plffs' motion to vacate stay order filed. 9-24-74

101a. AFFIDAVIT of Frank H. Easterbrook filed. 9-24-74

102. STATEMENT of defts in opposition to plffs' motion for temporary restraining order filed. 9-24-74

102a. AFFIDAVIT of Nancy Snyder filed. 9-24-74

103. MEMORANDUM of defts in opposition to plffs' motion for temporary restraining order filed. 9-24-74

VOLUME FOUR

104. ORDER: HEARING AT CATLETTSBURG on 9/24/74; Assigned for hearing before three-judge court at Lexington on 10/4/74 at 2 PM. 9-25-74

105. SUPPLEMENTAL STATEMENT of defts in support of motion to strike filed. 10-4-74

105a. Copy Opinion Larry William Kelly, et al v. Brennan (Civil 74-450, D.Ore. 9/13/74).

106. SUPPLEMENTAL BRIEF of defts in support of motion to dismiss & cross-motion for summary judgment filed. 10-4-74

106a. Brief of Appellee, National Independent Coal Operator's Association v. Brennan, Sup. Court No. 73-1902, Oct. Term, 1974.

107. ORDER: HEARING AT LEXINGTON on 10/4/74 before three-judge panel; matter taken under advisement; all pending motions held in abeyance. 10-8-74

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112. MEMORANDUM OPINION of three-judge court filed. 11-19-74

113. ORDER: (1) Irrebuttable presumption set forth in 30 USC 921(c)(3) and the limitation of evidence necessary to rebut the presumption created by 30 USC 921(c)(4) are violative of the U. S. Constitution; (2) Sec. of Labor shall no longer seek to apply the irrebuttable presumption made by 30 USC 921(c)(3) or to limit evidence in rebuttal to the presumption created in 30 USC 921(c)(4); (3) all other provisions of the Act which have been considered are permissible under the Fed. Const.; (4) all matters raised in the pleading outside the jurisdiction of the three-judge court are retained for consideration by requesting judge. 11-19-74

114. MOTION of defts to amend the judgment filed. 12-2-74

115. MOTION of plffs to set for hearing issues raised but not resolved by 11/19/74 decision of three-judge court filed. 12-12-74

116. OBJECTIONS of plffs to defts' motion to amend judgment filed. 12-13-74

117. ORDER: defts' motion to amend judgment overruled; this ruling may be considered a rule under Rule 54(b), FRCP, for purposes of appeal. 12-17-74

118. MOTION of defts for a stay pending reconsideration or appeal filed. 12-26-74

119. MEMORANDUM of defts in support of motion for a stay pending reconsideration or appeal filed. 12-26-74

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121. SUPPLEMENTAL MEMORANDUM of defts in support of motion to dismiss & cross-motion for summary judgment filed. 12-26-74

122. MOTION of plffs for leave to file response to defts' motion for stay pending appeal and defts' supplemental memorandum in support of their motion to dismiss filed. 1-9-75

123. MEMORANDUM of plffs in opposition to defts' motion for stay pending appeal filed. 1-10-75

123a. Document: Re—William Norman.

123b. Document: Re—James W. Nahas.

123c. Document: Re—Wedsel Toppings.

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126. NOTICE OF APPEAL filed by defts. 1-16-75

127. NOTICE OF APPEAL filed by plffs. 1-20-75

128. RESPONSE of plffs to defts' supplemental memorandum in support of their motion to dismiss & motion for summary judgment TENDERED. 1-20-75

129. MEMORANDUM OPINION & ORDER: defts' motion for stay of the injunction issued on 11/20/74 is overruled. 1-22-75

DEPOSITIONS FILED

DEPOSITION NO. 1—Nancy Snyder, filed Jan. 21, 1974

DEPOSITION NO. 2—National Council on Compensation Insurance by GEORGE F. REALL filed Feb. 25, 1974

[Jurat omitted in printing]

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

[Title omitted in printing]

Complaint For Injunction And Declaratory Relief

Jurisdiction

1. This is a civil action arising under the Constitution and laws of the United States. The matter in controversy exceeds the value of $10,000.00, exclusive of interest and costs. The Court's jurisdiction is invoked pursuant to Section 1331 of Title 28 of the United States Code.

2. Plaintiffs seek to enjoin implementation and enforcement of Part C of Title IV of the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742, 30 U.S.C. §§901, *et seq.*, as amended, May 19, 1972, Pub. L. 92-303, 86 Stat. 150) on the ground that said statute on its face and as applied by the Defendants violates rights secured to Plaintiffs by the Constitution of the United States. Plaintiffs also seek declaratory relief concerning the proper interpretation of certain provisions of said statute.

3. Convocation of a three-judge court is required in this action by and pursuant to Sections 2282 and 2284 of Title 28 of the United States Code.

Parties

1. Plaintiffs are corporations organized for the purpose, *inter alia*, of engaging in the business of mining coal. Plaintiffs' names, states of incorporation, principal places of business, and the states in which they are conducting coal mining operations are:

Plaintiff	Incorporated In:	Principal Place Of Business At:	Operating Mines In:
Turner Elkhorn Mining Company	Ky.	Drift, Ky.	Ky.
South-East Coal Company	Ky.	Paintsville, Ky.	Ky.
Russell Fork Coal Company	W.Va.	Elkhorn City, Ky.	Ky.
Peabody Coal Company	Del.	St. Louis, Mo.	Ky.,Ala.,Ariz., Ark.,Colo.,Ind., Ill.,Ohio,Okla., Mo.,Mont.,Utah
Zeigler Coal Company	Ill.	Chicago, Ill.	Ky.,Ill.
Alabama By-Products Corporation	Del.	Birmingham, Ala.	Ala.
Amherst Coal Company	W.Va.	Port Amherst, W.Va.	W.Va.
Arch Mineral Corporation	Del.	St. Louis, Mo.	Ala.,Ill.,Wyo.
CF&I Steel Corporation	Colo.	Pueblo, Colo.	Colo.
Cannelton Industries, Inc.	W.Va.	Cannelton, W.Va.	W.Va.
Carbon Fuel Company	W.Va.	Charleston, W.Va.	W.Va.
Central Ohio Coal Company	Ohio	Cumberland, Ohio	Ohio
Freeman Coal Mining Company, Division of Material Service Corporation	Del.	Chicago, Ill.	Ill.
Hawley Coal Mining Corporation	W.Va.	Keystone, W.Va.	W.Va.
Imperial Colliery Company	W.Va.	Lynchburg, Va.	W.Va.
Kessler Coals, Inc.	W.Va.	Whitesville, W.Va.	W.Va.
Mears Coal Company	Pa.	Marion Center, Pa.	Pa.
Milburn Colliery Company	W.Va.	Lynchburg, Va.	W.Va.
Old Ben Coal Corporation	Del.	Chicago, Ill.	Ill.,Ind.,Va.
Omar Mining Company	W.Va.	Madison, W.Va.	W.Va.
Slab Fork Coal Company	W.Va.	Slab Fork, W.Va.	W.Va.
The North American Coal Corporation	Ohio	Cleveland, Ohio	Ohio,Pa.,N.D.

2. Defendant Peter J. Brennan is Secretary of the United States Department of Labor, and is named as a Defendant herein in his capacity as an officer of the United States.

3. Defendant Caspar W. Weinberger is Secretary of the United States Department of Health, Education and Welfare, and is named as a Defendant herein in his capacity as an officer of the United States.

COUNT I

1. Plaintiffs presently are engaged in the mining of coal at numerous mining sites in seventeen states. Together, Plaintiffs employ over 28,000 miners and produce approximately 134,300,000 tons of coal each year. Each of the Plaintiffs is subject to present and future obligations and liabilities created and imposed upon them by Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §§ 901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, Public Law 92-303, 86 Stat. 150, a true and correct copy of which is attached hereto as Exhibit A.

2. The Federal Coal Mine Health and Safety Act of 1969 was enacted to establish stringent health and safety standards for underground coal mines, especially with respect to dust conditions prolonged exposure to which over many years may contribute to development of a chronic respiratory disease known as coal workers' pneumoconiosis. In addition to specifying numerous health and safety standards to govern mining operations, Congress, in Title IV of the Act, as amended by the Black Lung Benefits Act of 1972, created a program of economic relief for miners and former miners who have contracted respiratory ailments which are presumed to be coal workers' pneumoconio-

sis and who are presumed to be, or are found to be, "totally disabled"—as that term is defined in the Act—by coal workers' pneumoconiosis, and the surviving dependents of miners and former miners who have died of the disease, or who are presumed to have been "totally disabled" by the disease at the time of their deaths.

3. Under said Title IV, the Federal Government, through the Department of Health, Education and Welfare, is required to pay life-time benefits to such persons who have filed claims therefor during the period December 30, 1969 through June 30, 1973. During the period July 1, 1973 through December 31, 1973, the benefits program is to be administered by both of the Defendants herein, pursuant to Regulations jointly promulgated by them. Beginning January 1, 1974, Plaintiffs and all other coal mine operators will be liable under the law for payment of such benefits to such persons who have filed claims since June 30, 1973, as well as those who file claims after December 31, 1973. This liability is to be enforced by the Defendant Secretary of Labor, unless the claimant resides in a state that has enacted a workmen's compensation statute recognized by said Defendant as affording coverage and benefits equivalent to those of the federal law. At the time of filing of this complaint no state's law had been so recognized by said Defendant.

4. Under said Title IV, Plaintiffs will be held liable to pay benefits not only to their present and future employees who become disabled by coal workers' pneumoconiosis arising out of their employment, but also to: (a) persons not now employed as mine workers who were formerly employed by them, either before or after enactment of the law; (b) persons formerly employed by them before or after enactment of the law, who are now employed by

other mine operators; (c) the former and present employees of any mine acquired by them since December 30, 1969; (d) the surviving wife, children, parents, brothers or sisters of the persons described in (a), (b) and (c) above, whether or not such persons died while in their employ either before or after enactment of the law, or were receiving benefits under the law at the time of death.

5. The scope of the benefits provided for under said Title IV as administered by Defendants is such that each claim allowed against a coal mine operator will represent a potential liability having a present value of approximately sixty to ninety thousand dollars, which amounts to an industry-wide potential cost under the benefits program of approximately two to five dollars per ton of coal at an annual production of 600 million tons.

6. Under Section 423 of said Title IV, all present and former coal mine operators are required to secure the payment of benefits for which they are liable under the law by either qualifying as a self-insurer in accordance with regulations established by the Defendant Secretary of Labor, or by insuring the payment of such benefits with an insurance carrier or state fund.

7. The cost of insuring or self-insuring the payment of such benefits as required by said Section 423 is prohibitive for substantial numbers of coal mine operators. Plaintiffs are informed and do believe that some coal mine operators are financially incapable of self-insuring said liability, and that some of said coal mine operators have or will be required to cease doing business as a direct result of their inability to comply with the provisions of said Section 423, or as an indirect result of the onerous economic burdens imposed upon them by said Title IV.

8. The new liabilities created by said Title IV directly and indirectly will cause Plaintiffs immediate substantial and irreparable injury, for which they have no adequate remedy at law, and will have a seriously adverse impact upon the economy of the coal mining industry and the nation's energy resources generally.

9. The liability thus imposed upon Plaintiffs is to compensate miners or their survivors for disabilities incurred prior to the enactment of the law under coal production conditions and coal marketing conditions that did not and could not have reflected such potential liability. The imposition of such liability upon Plaintiffs is a manifestly arbitrary and unreasonable means for providing economic relief to past victims of coal workers' pneumoconiosis and therefore deprives Plaintiffs of the fundamental fairness and equal protection of law guaranteed them by the Fifth Amendment to the United States Constitution.

10. The matters herein alleged are the subject of a present and actual controversy between Plaintiffs and Defendants. Plaintiffs are without an adequate remedy at law for the substantial and irreparable injury with which they are threatened and require interlocutory injunctive relief to protect and preserve their rights. The granting of such relief would not interfere with the continuing processing and payment of claims by Defendant Secretary of Labor under Part C of said Title IV, because said Defendant expressly is required to pay such claims out of Federal funds, pursuant to the mandate of Clause (2) of Section 424 of said Part, which provides that in cases where ". . . there is no operator who was required to secure the payment of such benefits, the Secretary shall pay such miner, or such widow, child, parent, brother or sister the benefits to which he or she is so entitled."

Wherefore, Plaintiffs pray that this Court grant them interlocutory and permanent injunctive relief restraining the Defendants, and each of them, and their agents and successors, from implementing and/or enforcing against Plaintiffs the provisions of Part C of Title IV of the Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, including but not limited to: (1) the provision of Section 422 of said Part C imposing liability upon Plaintiffs for the payment of benefits provided for under said law; and (2) the provisions of Section 423 of said Part C requiring Plaintiffs to secure payment of said benefits through insurance or self-insurance; and that the Court enter its order expressly directing the Defendant Secretary of Labor to pay benefits upon all claims heretofore and hereafter allowed by him under said Part C pursuant to the mandate of Clause (2) of Section 424 of said Part.

COUNT II

1-8. Plaintiffs repeat and reallege Paragraphs 1 through 8 of Count I as Paragraphs 1 through 8 of this Count II as though fully set forth herein.

9. Claims filed against coal mine operators under Part C of said Title IV are to be adjudicated upon the basis of certain presumptions established in Section 411(c) of Part B, which provides in relevant part that:

> "(1) if a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that this pneumoconiosis arose out of such employment;
>
> (2) if a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable

presumption that his death was due to pneumoconiosis;

• • •

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's or his dependent's claim under this title and it is interpreted as negative . . . , and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. • • •"

10. Although termed "rebuttable" presumptions on the face of the statute, the presumptions established in Clauses (2) and (4) of said Section 411(c), as applied by Defendants, are in fact irrebuttable, because there is no practical method of rebutting such presumptions in the vast majority of cases in which they will operate against Plaintiffs.

11. Whether considered to be "rebuttable" or "irrebuttable", the presumptions established by said Clauses (2) and (4) are arbitrary and irrational bases upon which to predicate coal mine operators' liability for any and all claims for which they are made responsible under Part C, because there is no rational connection between the facts to be proved to invoke the presumptions and the ultimate facts to be presumed.

12. The ten-year presumptions established by Clauses (1) and (2) of said Section 411(c) are arbitrary and irrational as applied to claims arising in whole or part out

of periods of employment during which dust regulations established by the Coal Mine Health and Safety Act of 1969 are in force, because the facts to be proved to invoke said presumptions have no rational connection to the ultimate fact to be presumed.

13. Application of said presumptions in the adjudication of claims for which Plaintiffs may be held liable under Part C of said Title IV will expose Plaintiffs to liability for the payment of benefits to substantial numbers of miners or their survivors: (1) who are not or were not in fact totally disabled by a respirable disease, (2) who suffer or suffered from a respirable disease other than pneumoconiosis, or (3) who did not develop pneumoconiosis as a result of employment in mining, all in violation of Plaintiffs' right to due process of law under the Fifth Amendment to the United States Constitution.

14. The matters herein alleged are the subject of a present and actual controversy between Plaintiffs and Defendants. Plaintiffs are without an adequate remedy at law for the substantial and irreparable injury with which they are threatened, and require interlocutory injunctive relief to protect and preserve their rights. The granting of such relief would not interfere with the continuing processing and payment of claims by Defendant Secretary of Labor under Part C of said Title IV, because said Defendant expressly is required to pay such claims out of Federal funds, pursuant to the mandate of Clause (2) of Section 424 of said Part, which provides that in cases where ". . . there is no operator who was required to secure the payment of such benefits, the Secretary shall pay such miner, or such widow, child, parent, brother or sister the benefits to which he or she is so entitled."

Wherefore, Plaintiffs pray that this Court grant them interlocutory and permanent injunctive relief restraining the Defendants, and each of them, and their agents and successors, from imposing liability upon Plaintiffs for payment of benefits on all claims allowed under Part C of said Title IV upon the basis of facts presumed pursuant to the provisions of Clauses (2) and (4) of Section 411(c) of Part B of said Title, and from imposing such liability upon the basis of facts presumed pursuant to Clauses (1) and (2) of said Section in cases where the claim arises in whole or part out of periods of employment subsequent to the effective date of the dust control requirements of the Coal Mine Health and Safety Act of 1969, and that this Court enter its order expressly directing the Defendant Secretary of Labor to pay benefits upon all claims heretofore and hereafter allowed by him under said Part C pursuant to the mandate of Clause (2) of Section 424 of said Part.

COUNT III

1-8. Plaintiffs repeat and reallege Paragraphs 1 through 8 of Count I as Paragraphs 1 through 8 of this Count III, as though fully set forth herein.

9. Section 422(h) of said Title IV directs the Defendant Secretary of Labor to establish by regulations:

> ". . . standards, which may include appropriate presumptions, for determining whether pneumoconiosis arose out of employment in a particular coal mine or mines. The Secretary may also, by regulation, establish standards for apportioning liability for benefits under this subsection among more than one operator, where such apportionment is appropriate."

Pursuant to said Section 422(h), said Defendant has promulgated regulations designated as Subpart D of Part

725 of Subchapter B of Chapter VI of Title 20 of the Code of Federal Regulations, effective November 30, 1972.

10. In Section 725.311 of said Subpart D (20 CFR 725.311) said Defendant has established an irrebuttable presumption that a miner's work-related pneumoconiosis arose in whole or in part sufficiently to occasion liability, out of his employment with the coal mine operator for whom he most recently worked a cumulative year, and such operator accordingly is to be liable for payment, and securing through insurance or self-insurance the payment of the benefits awarded the miner, if the operator is financially capable of doing so. If that operator is not so capable, the presumption applies against the operator by whom the miner was employed the next-most recent cumulative year, until a "responsible operator", if any, is found.

11. Said presumptions are arbitrary and irrational, and are not "appropriate" presumptions within the meaning of Section 422(h) of said Title IV, because: (a) there is no rational connection between a miner's most recent one-year cumulative employment by a particular operator and development in the miner of coal worker's pneumoconiosis; and (b) there is no rational connection between a coal mine operator's financial ability to insure payment of said benefits, and the development of said disease in said miner.

12. Enforcement of said presumptions against Plaintiffs will result in imposition of liability upon them for payment of benefits without due process of law, in violation of rights secured to them by the Fifth Amendment to the United States Constitution.

13. The matters herein alleged are the subject of a present and actual controversy between Plaintiffs and Defendants. Plaintiffs are without an adequate remedy at

law for the substantial and irreparable injury with which they are threatened, and require interlocutory injunctive relief to protect and preserve their rights. The granting of such relief would not interfere with the continuing processing and payment of claims by Defendant Secretary of Labor under Part C of said Title IV, because said Defendant expressly is required to pay such claims out of Federal funds, pursuant to the mandate of Clause (2) of Section 424 of said Part, which provides that in cases where ". . . there is no operator who was required to secure the payment of such benefits, the Secretary shall pay such miner, or such widow, child, parent, brother or sister the benefits to which he or she is so entitled."

Wherefore, Plaintiffs pray that this Court—

A. Declare 20 CFR §725.311 void and of no effect as in excess of and contrary to the authority delegated the Defendant Secretary of Labor by Section 422(h) of said Title IV, and grant Plaintiffs interlocutory and permanent injunctive relief restraining said Defendant, his agents and successors from enforcing liability against Plaintiffs for the payment of any and all claims adjudicated pursuant to such Regulation;

B. In the alternative, if this Court should find that said Defendant was acting pursuant to authority granted him under Section 422(h) of said Title IV in promulgating 20 CFR §725.311, Plaintiffs pray that this Court declare said Section 422(h) void and of no effect as inconsistent with rights secured to Plaintiffs by the Fifth Amendment to the United States Constitution, and grant the Plaintiffs the injunctive relief prayed for in Paragraph A above; and

C. Enter its order expressly directing said Defendant to pay benefits upon all claims heretofore and hereafter allowed by him under Part C of Title IV pursuant to the mandate of Clause (2) of Section 424 of said Part.

COUNT IV

1-8. Plaintiffs repeat and reallege Paragraphs 1 through 8 of Count I as Paragraphs 1 through 8 of this Count IV, as though fully set forth herein.

9. The Black Lung Benefits Act of 1972 amended Section 422(a) of Part C of said Title IV to include medical benefits (as provided for in Section 7 of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC §907) among those benefits that coal mine operators must pay after December 31, 1973 in connection with claims allowed against them after June 30, 1973.

10. Defendant Secretary of Labor has interpreted said amendment as requiring that after December 31, 1973, coal mine operators insure the payment of, and pay, such medical benefits to persons who have filed claims and been awarded life-time Federal benefits under Part B of said Title IV prior to July 1, 1973, and in implementation thereof has promulgated Regulations so providing at 20 CFR §720.109(a).

11. Defendant Secretary of Labor's interpretation of said amendment is unwarranted, unlawful, contrary to the clear intent and meaning of said Title IV, and in excess of his authority under said Title. Enforcement of Section 422(a) as interpreted and implemented by said Defendant will result in the imposition of liability upon Plaintiffs for the payment of medical benefits in cases previously adjudicated by the Defendant Secretary of Health, Education and Welfare, substantial numbers of which involve false, fraudulent, or grossly excessive claims improperly allowed by said Defendant, and in none of which were Plaintiffs given

any notice or opportunity to be heard and present proof on the merits of said claims, all in violation of the due process of law guaranteed Plaintiffs by the Fifth Amendment to the United States Constitution.

12. The matters herein alleged are the subject of a present and actual controversy between Plaintiffs and Defendants. Plaintiffs are without an adequate remedy at law for the substantial and irreparable injury with which they are threatened, and require interlocutory injunctive relief to protect and preserve their rights. The granting of such relief would not interfere with the continuing processing and payment of claims by Defendant Secretary of Labor under Part C of said Title IV, because said Defendant expressly is required to pay such claims out of Federal funds, pursuant to the mandate of Clause (2) of Section 424 of said Part, which provides that in cases where ". . . there is no operator who was required to secure the payment of such benefits, the Secretary shall pay such miner, or such widow, child, parent, brother or sister the benefits to which he or she is so entitled."

Wherefore, Plaintiffs pray that this Court—

A. Declare 20 CFR §720.109(a) void and of no effect as contrary to the clear intent and meaning of Section 422(a) of said Title IV and in excess of and contrary to the authority delegated the Defendant Secretary of Labor by said Title IV, and grant Plaintiffs interlocutory and permanent injunctive relief restraining said Defendant, his agents and successors, from soliciting, entertaining or allowing the refiling of claims allowed by the Defendant Secretary of Health, Education and Welfare prior to July 1, 1973, for purposes of imposing liability upon Plaintiffs for the payment of medical benefits to such claimants in the future;

B. In the alternative, if this Court should find that said Defendant was acting pursuant to and consistent with said Section 422(a) in promulgating 20 CFR §720.109(a), Plaintiffs pray that this Court declare said Section 422(a) void and of no effect as inconsistent with rights secured to Plaintiffs by the Fifth Amendment to the United States Constitution, and grant Plaintiffs the injunctive relief prayed for in Paragraph A above.

C. In the further alternative, if this Court should find that said refilings and payments are permissible under said Section 422(a), then Plaintiffs pray that this Court enter its order expressly directing said Defendant to make such payments pursuant to the mandate of Clause (2) of Section 424 of Part C of said Title IV.

/s/ Lord, Bissell & Brook
135 South LaSalle Street
Chicago, Illinois 60603
Telephone: 312-786-6328

By: /s/ Stephen A. Milwid
/s/ R. R. McMahan
Boehl, Stopher, Graves & Deindoerfer
2300 Louisville Trust Bank Building
One Riverfront Plaza
Louisville, Kentucky 40202
Telephone: 502-589-5980

By: James M. Graves
Attorneys for Plaintiffs

[Copy of statute attached as Exhibit to complaint omitted in printing]

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky at Pikeville
[Title omitted in printing]

Answer

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter.

Third Defense

Responding specifically to the numbered paragraphs of the complaint, defendants state:

Jurisdiction

1-3. These paragraphs set forth conclusions of law and plaintiffs' statement of the case and not allegations of fact for which an answer is required, but insofar as an answer is required, they are denied.

Parties

1. Denied for lack of information or knowledge sufficient to determine the truth of the allegations.

2. Denied except to admit that Peter J. Brennan is Secretary of the United States Department of Labor.

3. Denied except to admit that Caspar W. Weinberger is Secretary of the United States Department of Health, Education and Welfare.

Count I

1. Denied for lack of information or knowledge sufficient to form a belief as to the truth of the allegations.

2-4. These paragraphs set forth conclusions of law and not allegations of fact for which an answer is required, but insofar as an answer is required, are denied.

5. Denied.

6. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is required, but insofar as an answer is required, is denied.

7. Denied.

8. Denied.

9. Denied.

10. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is required, but insofar as an answer is required, is denied.

Count II

1-8. Defendants reallege the answers to paragraphs 1-8 of Count I as though fully set forth herein.

9. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is not required; the quotations from section 411(c) of Part B speak for themselves.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

Count III

1-8. Defendants reallege the answers to paragraphs 1-8 of Count I as though fully set forth herein.

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

Count IV

1-8. Defendants reallege the answers to paragraphs 1-8 of Count I as though fully set forth herein.

9. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is required, but insofar as an answer is required, is denied.

10. Denied.

11. Denied.

12. Denied.

Defendants deny each and every allegation of fact not hereinbefore denied.

Respectfully submitted,

William J. Kilberg Solicitor of Labor	Irving Jaffe Acting Assistant Attorney General
James G. Johnston Associate Solicitor	United States Attorney
Mark E. Solomons	Harland F. Leathers
Frank A. White Attorneys, Department of Labor Co-Counsel for Defendant Peter J. Brennan, Secretary, United States Department of Labor	David Orlikoff Attorneys, Department of Justice Counsel for Defendant Caspar W. Weinberger, Secretary, United States Department of Health, Education and Welfare Co-Counsel for Defendant Peter J. Brennan, Secretary, United States Department of Labor

[Certificate of Service omitted in printing]

Civil Action No. 1761
In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

[Title omitted in printing]

Plaintiffs' Motion For Summary Judgment

Plaintiffs Turner Elkhorn Mining Company, *et Al.*, move this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure to:

1. Enter a summary judgment in Plaintiffs' favor for the relief demanded in each of the four counts of Plaintiffs' Complaint on the ground that there is no genuine issue as to any material fact and that Plaintiffs are entitled to a judgment as a matter of law;

or, in the alternative,

2. If summary judgment is not rendered in Plaintiffs' favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

(a) Defendant Brennan's Answers dated October 30, 1973 to Plaintiffs' First Set of Interrogatories, heretofore filed with the Court;

(b) Defendants' Answers dated January 15, 1974 to Plaintiffs' Second Set of Interrogatories, heretofore filed with the Court;

(c) Defendants' Statement dated January 18, 1974 in Response to Plaintiffs' First Request for Admissions of Fact, heretofore filed with the Court;

(d) Deposition of Nancy Snyder, Director of the Division of Coal Mine Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, dated December 5, 1973, heretofore filed with the Court;

(e) Deposition of George F. Reall, Manager of the National Council on Compensation Insurance, dated January 16, 1974, heretofore filed with the Court;

(f) Affidavit of J. Huell Briscoe dated January 21, 1974, attached hereto;

[*](g) Documents produced by the Defendant Brennan in response to Plaintiffs' Request for Production of Documents pertaining to the claims for benefits under Title IV of the Coal Mine Health and Safety Act of:

William Thompson	Soc. Sec. No. 304-14-3468
Claude Pennington	Soc. Sec. No. 307-03-6192
Cecil Purnell	Soc. Sec. No. 355-09-2809
Andrew Smith	Soc. Sec. No. 303-05-2658

true and complete copies of which are attached hereto.

[*](h) Documents served by the U.S. Department of Labor upon two of the Plaintiffs named herein pertaining to the claims for benefits under Title IV of the Coal Mine Health and Safety Act of

Craig Fulton	Soc. Sec. No. 283-09-7890
Alva A. Libbey	Soc. Sec. No. 354-10-9906

true and complete copies of which are attached hereto.

[Signatures and Certificate of Service omitted in printing]

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[*] Documents omitted in printing.

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

[Title omitted in printing]

Affidavit Of J. Huell Briscoe

State Of Illinois
County Of Cook—ss

J. Huell Briscoe, being first duly sworn, deposes and says that if he were called as a witness in the captioned matter, he would testify under oath as follows:

He is a practicing actuary and has been one for 35 years. He is President of J. Huell Briscoe & Associates, Inc., 307 North Michigan Avenue, Chicago, Illinois 60601, a firm of consulting actuaries, and has been a fellow of the Conference of Actuaries in Public Practice and a member of the American Academy of Actuaries since these societies were organized. His actuarial practice has included actuarial studies for casualty insurers, state insurance departments, national and state associations, and nationally known business corporations. His experience includes studies of the frequency and severity of claims under workmen's compensation policies.

He has qualified as an expert witness in insurance matters (including rating procedures) in administrative hearings in several states including Illinois, Kentucky, Pennsylvania, Tennessee, Florida and Louisiana, and in state courts including Illinois and Pennsylvania, and in Federal

courts including the U.S. Court of Claims, and United States Tax Court.

He has examined available data on the frequency and severity of claims to be expected under Part C of Title IV of the Coal Mine Safety Act of 1969, as amended by the Black Lung Act of 1972, and under the similar provisions enacted by states in an effort to comply with the requirements of Part C of that Act, as amended.

His examinations of the available data have been occasioned by (1) his representation as consulting actuary of the Coal Mine Rating Bureau of Pennsylvania and (2) a consulting actuary for Old Republic Insurance Company (the largest insuror of workmen's compensation for coal mine companies in the United States), a relationship that has existed continuously for more than 25 years.

During the course of his analysis, he has consulted and collaborated with the actuarial staff of the National Council on Compensation Insurance.

His research and examination of the available pertinent data have indicated clearly that only two meaningful sources of information exist as to frequency of "Black Lung" claims, or expected claims, for currently employed mine workers. These sources are: (1) the experience under the Pennsylvania Act #337 Coal Mine Occupational Disease, and (2) a study of 62,876 miners by the National Institute of Occupational Safety and Health (NIOSH) under the 1969 Coal Mine Health and Safety Act provisions. Each of these sources of data include information as to age.

His research has further determined that, as to former coal mine workers eligible for additional or new benefits under the July 1, 1973 amendment to the Act, periodic reports from the Social Security Administration of the De-

partment of Health, Education & Welfare are obtainable as to "Black Lung Benefit" claimants.

His research has also determined that as to frequency and severity, the age of the average worker and a claimant are significant as to final financial results and that such age factors are available in each source data except the "Status Reports" from the Social Security Administration Division of the Department of Health, Education and Welfare.

His research also indicates that the "NIOSH" studies are probably not representative as to the older age groups (60-64) wherein respiratory involvement is most prevalent, and that the results reflected therefrom are probably understated as to frequency of expected claims.

He states that in his opinion, the Pennsylvania studies are the most reliable since they reflect actual claims incurred under an Act quite similar to the Federal Act, except as to the amount of benefits.

The Pennsylvania frequency for "Black Lung" claims for the four year period under review amounted to 1.47/100 working miners for the age group under 63, and 29.11/100 for the age group over 63, an overall average of 12.91/100 of working miners.

He states that in his opinion the frequency used by the National Council on Compensation Insurance of 2.57/100 working miners (obtained from the NIOSH studies) is most conservative as to working miners and makes little or no allowance for the vast potential exposure incident to presently disabled miners (136,600 as of April, 1973) filing for medical benefits provided for by the 1972 amendment to the Act.

He states that in his opinion, the present value of Federal Indemnity Benefits computed by the National Council at $56,384.51 per claim is proper. He further states that in his opinion, the present value of medical benefits computed by the National Council at $12,216.00 is based on the latest available information, and is reasonably accurate. In each instance, the present value has been computed on the basis of life expectancy using the U.S. Lives Mortality Table with interest assumed at 3.50%.

He states that in his opinion, the coal mine industry can expect to incur liability under the Federal "Black Lung" Act of at least $279,805,000 per year as to presently employed miners as follows:

Estimated Working Population of Coal Miners		135,000
Frequency		2.57%
Expected Claims		3,469.5
Present Value Per Claim		
Indemnity	$56,334	
Medical	$12,216	$ 68,550
Estimated Pure Claim Cost Incurred Per Year		$237,834,225
Estimated Annual Workmen's Compensation Insurance Cost for Active Miners (Based on an expense loading of 15%)		$279,804,971

He further states that in his opinion, the coal mine industry can expect medical claims from former miners already disabled with a present value of at least $2,236,246,588 as follows:

Former Miners Drawing Benefits at 4/30/73	130,600	
Claims Awaiting Determination at 4/30/73	56,000	
Estimated Additions	25,000	
Estimated Claimants		155,600
Estimated Present Value Per Medical Claim		$12,216
Estimated Pure Medical Claim Cost for Former Miners Recently Disabled		$1,900,809,600
Estimated Workmen's Compensation Insurance Cost (Based on Expense Loading of 15%)		$2,236,246,588

/s/ J. Huell Briscoe

Subscribed And Sworn to before me
this 21st day of January, 1974

/s/ Nancy M. Zorn
Notary Public

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky at Pikeville

[Title omitted in printing]

Affidavit Of George W. Wright

State Of Colorado
County Of Denver—ss

I, George W. Wright, of 460 South Marion Parkway, Denver, Colorado, being first duly sworn, depose and say

that if I should be called to testify as a witness in the above-captioned cause, I would state under oath as follows:

1. I am a physician specializing in pulmonary and occupational diseases, licensed to practice medicine in the states of New York and Ohio. I am a member of the American Association for Thoracic Surgery, the American Thoracic Society, the American Clinical and Climatological Association, and the Industrial Medical Association.

2. I presently am Consultant for Environmental Affairs for Johns-Manville Corporation, Denver, Colorado. From 1953 to 1972, I was Head of the Medical Research Division of Saint Luke's Hospital, Cleveland, Ohio, and Professor of Internal Medicine at Case Western Reserve University, Cleveland, Ohio. From 1960 to the present, I have been Chairman of the Social Security Administration Medical Advisory Committee (Disability); from 1965 to present, a member of the Permanent Commission and International Association on Occupational Health; and from 1969 to 1970 inclusive, a member of the Environmental Health Sciences Training Committee of the National Institute of Environmental Health Sciences of the Department of Health, Education and Welfare.

3. According to the scientifically valid information currently available, coal miners in the United States have experienced the development of two kinds of lung tissue reaction as a result of exposure to dust in coal mines. One of these consists of discreet foci of dust characterized by a proliferative cellular reaction and reticulin deposition with slight to moderate fibrous tissue production, the latter dependent to some degree on the concentration of free crystalline silica co-existing with coal dust. This is the so-called "coal macule". This nodular reaction

is distributed rather evenly throughout both lungs and constitutes "simple coal workers' pneumoconiosis". Some coal miners may also develop a second reaction consisting of masses of large coalescing nodules, or extensive proliferative and hyalin tissue formation. This type of reaction is designated "progressive massive fibrosis" or PMF. These two types of tissue reaction distort the involved or neighboring lung tissue. These anatomical tissue reactions are the only unique or specific development consequent to deposition of coal mine dust, and comprise the anatomical basis for coal workers pneumoconiosis. Progressive massive fibrosis is virtually always preceded and accompanied by the discreet macular or nodular form of simple coal workers pneumoconiosis.

4. The discreet nodular densities that characterize simple coal workers' pneumoconiosis involve so little of the total lung in the pre-x-ray positive stage and also in the ILO or UICC category I stage that abnormalities consequent to lung loss are not measurable and have no disabling effect. In category II and category III of simple coal workers' pneumoconiosis there may be measurable effects of a restrictive nature. Small amounts of progressive massive fibrosis also may actually cause little impairment.

5. The chest roentgenogram is one of the required tools for making a diagnosis of coal workers pneumoconiosis unless the lung can be examined directly by microscope.

6. Chronic bronchitis and emphysema, which are of themselves capable of causing severe disability, are not caused by and do not constitute diseases to be designated as pneumoconiosis.

7. As set forth in Subpart D of Part 410 of Title 20 of the Code of Federal Regulations, "coal workers pneu-

moconiosis, anthracosiliosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis" are disease entities, having specific physical characteristics and known specific causative agents, and are accepted by the scientific world as varieties of the pneumoconiosis. In contrast physical impairments and physical conditions such as cardiac enlargement or enlargement of the left ventricle are the result of many diseases having nothing to do with the pneumoconioses. Such impairments or conditions therefore are not acceptable as diagnostic criteria of specific diseases and cannot be substituted for the proper diagnostic criteria of the diseases classed under "pneumoconiosis" as the scientific world understands and uses that term. For example, arteriosclerosis or systemic hypertension are the common diseases causing left ventricle hypertrophy while none of the pneumoconioses cause this condition.

Signed: George W. Wright

Subscribed and sworn to before me
this 22nd day of February, 1974
at Denver, Colorado,
Arapahoe County.

(Notarial Seal)

/s/ George M. Mollick
Notary Public

My Commission expires August 20, 1977

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

[Title omitted in printing]

Motion To Strike Affidavits And Other Documents In Support Of Plaintiffs' Motion For Summary Judgment

Defendants move the Court to strike defendant's answers to plaintiffs' first set of interrogatories directed to defendant Brennan, dated October 30, 1973, defendants' answers to plaintiffs' second set of interrogatories, dated January 15, 1974, defendants' statement in response to plaintiffs' first request for admissions of fact, dated January 18, 1974, deposition of Nancy Snyder, dated December 5, 1973, deposition of George F. Reall, dated January 16, 1974, affidavit of J. Huell Briscoe, dated January 21, 1974, all documents produced by defendant Brennan in response to plaintiffs' first request for production of documents pertaining to the claims of the following individuals: William Thompson, Claude Pennington, Cecil Purnell and Andrew Smith, all documents served upon two of the plaintiffs to this action by defendant Brennan pertaining to the claims of the following individuals: Craig Fulton and Alva A. Libbey, a document entitled "Coal Mine Compensation Bureau of Pennsylvania, Analysis of Exposure Under Pennsylvania Act 337, Coal Mine Occupational Disease," prepared by J. Huell Briscoe & Associates, Inc., dated May 29, 1973, a document entitled "Projected Direct Impact of Black Lung Program on Kentucky With Emphasis on

the Kentucky Coal Industry: a Preliminary Report," prepared by the University of Kentucky College of Business and Economics, dated July 9, 1973, Testimony of Kentucky Labor Commissioner James R. Yocom for Delivery to the General Subcommittee on Labor, U.S. House of Representatives, dated July 11, 1973, attached to and in support of plaintiffs' motion for summary judgment, and any further documents which plaintiffs may seek to introduce in support of their motion for summary judgment, including the affidavit of George W. Wright, M.D., dated February 22, 1974, which go beyond the legislative record compiled in conjunction with the enactment of the Federal Coal Mine Health and Safety Act of 1969, as amended, on the ground that all such extraneous material is immaterial and inadmissible in evidence in contravention of the requirements of Rule 56(e), Federal Rules of Civil Procedure.

[Signatures and Certificate of Service omitted in printing]

Civil Action No. 1761

In The
UNITED STATES DISTRICT COURT
For the Eastern District of Kentucky
at Pikeville

[Title omitted in printing]

Motion To Dismiss And Cross-Motion For Summary Judgment

Defendants Peter J. Brennan, Secretary of Labor and Caspar W. Weinberger, Secretary of Health, Education and Welfare, by their undersigned attorneys, hereby respectfully move the Court, pursuant to Rule 12 of the Federal Rules of Civil Procedure, to dismiss this action on the ground that the complaint fails to state a claim upon which relief may be granted.

Alternatively, defendants cross-move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment on the grounds that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law. In support of these alternative motions, the Court is respectfully referred to the brief filed herewith and the decision of the three-judge court in *National Independent Coal Operator's Association, et al.* v. *Brennan*, Civil Action No. 1711-73 (D.D.C. February 21, 1974), a certified copy of which is attached hereto.

[Signatures, Attachment to Motion, and Certificate of Service omitted in printing]

Affidavit Of Nancy Snyder

Washington, District of Columbia

I depose and say that:

I am Mrs. Nancy Snyder. Since July 1, 1973, I have been the duly appointed Director of the Division of Coal Mine Workers' Compensation (DCMWC) of the Employment Standards Administration, United States Department of Labor. In my capacity as Director of the DCMWC, it is my responsibility to administer the regulations of the Secretary of Labor promulgated for the purpose of carrying out the statutory command of section 415 of Part B and Part C of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. Among the functions of the DCMWC are to prepare, process, adjudicate, and in

respect of certain approved claims, pay benefits in respect of persons qualifying for black lung benefits under section 415 and Part C of the Act. In addition, it is my responsibility to guarantee that operators adjudicated liable for the payment of benefits in respect of any case are fully informed of their potential responsibility prior to adjudication, and are given an opportunity to participate meaningfully in all adjudicatory proceedings affecting such operator. Other responsibilities include budget, monitoring, staffing and other administrative functions which must be performed to assure efficient and continued operation of the program.

As of March 2, 1974, the Social Security Administration has received 547,900 miners' and survivors' claims. Of these more than 24,000 claims are survivors' claims filed on or after July 1, 1973. As of March 2, 1974, 352,000 claims have been approved by the Social Security Administration and an estimated 484,600 persons are receiving Federal lifetime black lung benefits under Part B of Title IV. The Social Security Administration is currently processing approximately 6,000 claims and will continue to accept and process all survivors' claims filed before January 1, 1974, or within 6 months from the date of death of the miner, whichever is later. The total cumulative payout by the Social Security Administration as of March 2, 1974, in respect of all prior approved claims is $2,331,080,000. It is estimated that the total payout by the Social Security Administration, for all approved claims in calendar year 1973 was $1,076,000,000.

As of March 31, 1974, the DCMWC has received 26,075 claims of living miners and is currently accumulating evidence and processing each of these claims. As of the above date, 536 "refiled" claims have been received and none of

those has thus far been approved nor has any coal operator been determined potentially liable for payment of medical benefits in respect of any such claim. It should be noted that all "refiled" claims are treated as new section 415 or Part C claims and are processed accordingly. Any prior evidence submitted to the Social Security Administration with respect to such claims is admissible in evidence but is not conclusive as to eligibility, either medical or otherwise.

As of March 31, 1974, 44 coal operators have thus far been designated authorized to self-insure under section 423 of the Act. There have been 1,774 certificates of purchase of commercial Part C black lung insurance received from coal operator's insurance carriers and State Workmen's Compensation funds. It is my understanding that no coal operator in any State will be denied commercial insurance or State fund coverage upon payment of the prescribed premium. It is also my understanding that the Federal Coal Mine Health and Safety Act endorsement appearing, described, and interpreted in 20 CFR 726.203 of the Secretary's regulations is currently being attached to all policies of compensation insurance sold where coverage for liability under the provision of Part C of Title IV of the Act is desired.

DCMWC currently employs 97 persons all of whom are situated in Washington, D.C. Among these persons are claim examiners, technical, advisory, administrative, and clerical staffs. Plans are currently progressing to increase the full staff to 151 persons by early 1974. To date, the Division has entered into contracts and agreements with 676 physicians and medical testing and treatment facilities to insure that (1) each claimant will have adequate medical facilities available to assist him in developing the medical evidence needed to support a claim and (2) to insure that medical treatment benefits will be available to totally

disabled miners beginning on January 1, 1974. It is informally estimated that the largest number of claims will be filed with DCMWC during fiscal year 1974. Thereafter it is anticipated that the claims load will decrease yearly to an average of between 5-7,000 claims per annum during and after fiscal year 1977.

The procedures by which coal operator liability is assessed with respect to any and all claims for which an operator may be found liable is that which is fully outlined in the duly promulgated regulations of the Secretary. Each potentially responsible operator is notified of the initial determination that a claim is pending for which he may be found liable. Such notification includes a copy of the claimant's claim form and all supporting evidence submitted, including all pertinent medical evidence, upon which the claimant's eligibility and the operator's liability may be predicated. Each operator is notified of and given an opportunity to participate in each and every stage of the ensuing adjudicatory proceedings, if any. In addition each operator is given the right to have any miner-claimant reexamined by a physician of such operator's choosing, if such examination is reasonably warranted. Any and all reliable and probative evidence may be submitted by a potentially liable operator with respect to any claim for which he may be found liable.

As of March 31, 1974, the DCMWC has initially determined 1,041 claims under section 415 and Part C of Title IV of the Act and the applicable regulations. Of these 206 claimants have been initially determined eligible to receive benefits either from a coal operator or from the Federal Treasury. 835 of these claimants have been initially denied benefits.

It is the policy and intent of the DCMWC and of the Secretary of Labor in administering section 415 and Part

C of Title IV of the Act to, as fully and fairly as is practicable and permissible within the law, carry out the clear congressional mandate that all coal miners who have become totally disabled by black lung and the survivors of all coal miners who have died due to or while totally disabled by black lung receive the full measure of benefits provided for them by the Act from whatever source is appropriate. It is also the policy of the DMCWC and the Secretary of Labor to fully insure, within the language and intent of the Act, that all coal operators who may be found liable for the payment of Part C black lung benefits will be treated fairly and reasonably and will be afforded the full range of rights and remedies provided for such operators by the Constitution and laws of the United States.

Affiant states that to the best of her knowledge and belief the foregoing statements are true and correct.

Dated and Signed This 5th Day of April, 1974.

/s/ Nancy Snyder

[Notarization omitted in printing]

Memorandum Opinion And Judgment Order Of The United States District Court For The Eastern District Of Kentucky At Pikeville In Civil Action No. 1761

(These documents are printed at pp. 1A-13A and pp. 14A-15A, respectively, of the Jurisdictional Statement filed in Case No. 74-1302).

Defendants' Motion To Amend Judgment, Filed In The United States District Court For The Eastern District Of Kentucky At Pikeville In Civil Action No. 1761

(This document is printed at pp. 16A-17A of the Jurisdictional Statement filed in Case No. 74-1302.)

Order Of The United States District Court For The Eastern District Of Kentucky At Pikeville In Civil Action No. 1761 Overruling Defendants' Motion To Amend Judgment

(This document is printed at pp. 29A-30A of the Jurisdictional Statement filed in Case No. 74-1302.)

SUPREME COURT OF THE UNITED STATES

Nos. 74-1302 and 74-1316

John T. Dunlop, Secretary of the United States Department of Labor, et al.,

Appellants,

v.

Turner Elkhorn Mining Company, et al.; and

Turner Elkhorn Mining Company, et al.

Appellants,

v.

John T. Dunlop, Secretary of the United States Department of Labor, et al.

APPEALS from the United States District Court for the Eastern District of Kentucky.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

June 9, 1975

A true copy Michael Rodak, Jr.

Teste:

Clerk of the Supreme Court of the United States

By /s/ Francis J. Corson

Deputy